

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 MUR: 7151

6 DATE COMPLAINT FILED: Oct. 14, 2016

7 DATE OF NOTIFICATION: Oct. 21, 2016

8 DATE OF LAST RESPONSE: Dec. 22, 2016

9 DATE ACTIVATED: Mar. 3, 2017

10
11 EXPIRATION OF SOL: July 26, 2021

12 ELECTION CYCLE: 2016

13
14 **COMPLAINANT:**

Democratic National Committee

15
16 **RESPONDENTS:**

Great America PAC and Dan Backer in his
official capacity as treasurer

Rudolph W. Giuliani

Donald J. Trump

Donald J. Trump for President, Inc.

and Bradley T. Crate¹ in his official capacity
as treasurer

23
24 **RELEVANT STATUTES**
25 **AND REGULATIONS:**

52 U.S.C. § 30116(a)(1), (f)

52 U.S.C. § 30118(a)

11 C.F.R. § 109.3

11 C.F.R. § 109.20

11 C.F.R. § 109.21

29
30 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

31
32 **FEDERAL AGENCIES CHECKED:**

None

33
34 **I. INTRODUCTION**

35 The Complaint in this matter alleges that Great America PAC and Dan Backer in his
36 official capacity as treasurer ("GAP"), an independent-expenditure-only political committee,
37 coordinated communications with Donald J. Trump's 2016 authorized presidential campaign
38 committee, Donald J. Trump for President, Inc. and Bradley T. Crate in his official capacity as

¹ Bradley T. Crate became treasurer for Donald J. Trump for President, Inc. on January 20, 2017. Timothy Jost was the treasurer at the time the Committee was notified of the allegations raised in the Complaint.

1 treasurer (the "Trump Committee"),² resulting in prohibited in-kind contributions. Specifically,
2 the Complaint alleges that in July 2016, GAP produced an advertisement that featured former
3 New York City Mayor Rudolph "Rudy" Giuliani expressly advocating for the election of Trump
4 in the 2016 presidential election. The Complaint alleges that the advertisement satisfied the
5 "conduct prong" of the Commission's test for coordinated communications because Giuliani was
6 an agent of the Trump Committee. Respondents deny the allegation that Giuliani was an agent
7 of Trump or the Trump Committee at the time, and argue that he appeared in the advertisement
8 solely in his personal capacity.

9 The available record does not support the conclusion that Giuliani was an agent of Trump
10 or the Trump Committee when he appeared in the GAP advertisement in July 2016, or otherwise
11 establish that the advertisement was a coordinated communication. Therefore, we recommend
12 that the Commission find no reason to believe that Respondents made or accepted prohibited in-
13 kind contributions in connection with the advertisement.

14 II. FACTUAL BACKGROUND

15 On February 8, 2016, GAP registered with the Commission as an independent-
16 expenditure-only political committee and named Dan Backer as its treasurer.³ During the 2016
17 election cycle, GAP reported making independent expenditures of approximately \$23,583,643 to
18 support Donald Trump or oppose Hillary Clinton in the 2016 presidential election.⁴ GAP made

² See Amended Trump Cmte. Statement of Org. at 1 (Jan. 20, 2017). The Trump Committee's previous treasurer was Timothy Jost. See Trump Cmte. Statement of Org. at 1 (June 26, 2015).

³ GAP Statement of Org. at 1 (Feb. 8, 2016). GAP initially registered as "TRUMPAC" but changed its name to Great America PAC on February 15, 2016. See GAP Amended Statement of Org. at 1 (Feb. 15, 2016).

⁴ See GAP Amended March 2016 Monthly Report at 505-06 (May 20, 2016); GAP Amended April 2016 Monthly Report at 354-61 (May 20, 2016); GAP Amended May 2016 Monthly Report at 84-89 (Sept. 12, 2016); GAP Amended June 2016 Monthly Report at 367-89 (Dec. 5, 2016); GAP Amended July 2016 Monthly Report at 3312-37 (Dec. 5, 2016); GAP Amended August 2016 Monthly Report at 1038-72 (Jan. 31, 2017); GAP Amended September 2016 Monthly Report at 1472-99 (Jan. 31, 2017); GAP Amended October 2016 Monthly Report at

1 \$2,567,900.79 in independent expenditures during the month of July 2016, when the
2 advertisement featuring Giuliani was released.⁵

3 The Complaint alleges that on July 26, 2016, GAP released an advertisement entitled
4 "Leadership" in which Giuliani appears on screen discussing the need to combat "Islamic
5 extremist terrorism," criticizing President Obama and Hillary Clinton's leadership, and stating
6 that "America's leadership can and must be better, and with Donald Trump as President, it will
7 be."⁶ The Complaint alleges that because GAP paid for "Leadership" and the advertisement
8 expressly advocates for the election of Trump as President, it meets the "paid for" and "content"
9 prongs, respectively, of the Commission's three-prong coordinated-communications test.⁷ The
10 Complaint notes that Giuliani served as an advisor to Trump, and in October 2016 took a leave
11 of absence from his law firm to continue advocating for Trump's election as President.⁸

12 The Complaint infers that Giuliani therefore served as an "agent" for the Trump
13 Committee, and, by appearing in "Leadership," was "materially involved" in its creation, thereby
14 meeting the "conduct" prong of the coordinated-communications test.⁹ The Complaint claims

1173–1200 (Feb. 21, 2017); GAP Amended 2016 Pre-General Election Report at 1297–1310 (Feb. 21, 2017); GAP Amended 2016 Post-General Election Report at 4, 591 (Dec. 9, 2016); GAP Amended 2016 Year-End Report at 4, 591 (Feb. 21, 2017).

⁵ GAP Amended August 2016 Monthly Report at 4 (Jan. 31, 2017).

⁶ Compl. at 3 (Oct. 14, 2016) (citing Great America PAC, "Leadership" (July 26, 2016), <https://www.youtube.com/watch?v=K9B711McRo>). The Complaint also claims that GAP produced a solicitation email under Giuliani's name, which Giuliani reviewed and signed, to raise funds for GAP's activities in support of Trump's candidacy. *Id.*

⁷ Compl. at 4; *see* 11 C.F.R. § 109.21.

⁸ Compl. at 2 (citing Robert Costa, "Donald Trump Consults with Rudy Giuliani as He Builds Political Kitchen Cabinet," WASH. POST (Feb. 21, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/21/donald-trump-consults-with-rudy-giuliani-as-he-builds-political-kitchen-cabinet/?utm_term=.9deccc26f2b2; Ken Kurson, "Rudy Giuliani Takes Break from Law Firm to Support Donald Trump," OBSERVER (Oct. 5, 2016), <http://observer.com/2016/10/exclusive-rudy-giuliani-sidelined-by-law-firm-for-supporting-donald-trump>).

⁹ Compl. at 4–5; *see* 11 C.F.R. §§ 109.3, 109.21(d)(2).

1 that because "Leadership" satisfies all three prongs of the Commission's coordination test, it
2 constitutes a coordinated communication, resulting in GAP making, and the Trump Committee
3 knowingly accepting, a prohibited in-kind contribution.¹⁰

4 GAP, Trump and the Trump Committee, and Giuliani each deny that "Leadership"
5 satisfied the Commission's coordinated-communications test, and claim that "Giuliani was not
6 an agent of the Trump campaign."¹¹ Specifically, GAP claims that Giuliani did not possess
7 "actual authority" to act on the Trump Committee's behalf when "Leadership" was produced.¹²
8 GAP also argues that even if Giuliani had the requisite authority to act as an agent of the Trump
9 Committee for some purposes, he did not have the authority to act on its behalf regarding
10 communications by third parties such as GAP. Respondents also maintain that, in any event,
11 Giuliani participated in the production of "Leadership" only in his personal capacity as a
12 volunteer, not as a surrogate for the Trump Committee.¹³

13 Trump and the Trump Committee maintain that Giuliani was a "friend of the candidate"
14 who offered "informal advice and counsel . . . on an ad hoc, volunteer basis[.]"¹⁴ They contend
15 that the Complaint provides no evidence that Giuliani was authorized to act as an agent of Trump
16 or the Trump Committee, and note that "Leadership" identifies Giuliani as the former mayor of
17 New York, not a surrogate for the Trump Committee.¹⁵ They also note that Commission

¹⁰ Compl. at 5.

¹¹ Resp. of Great America PAC and Dan Backer in his official capacity as treasurer, at 3 (Dec. 18, 2016) ("GAP Resp."); *see* Resp. of Donald J. Trump, Donald J. Trump for President, Inc. and Bradley T. Crate in his official capacity as treasurer, at 1–2 (Dec. 13, 2016) ("Trump Resp."); Resp. of Rudolph W. Giuliani at 1 (Dec. 22, 2016) ("Giuliani Resp.").

¹² GAP Resp. at 4.

¹³ *Id.* at 6–7.

¹⁴ Trump Resp. at 2.

¹⁵ *Id.* at 3–5.

1 precedent permits agents to “wear multiple hats” and act in a personal capacity for a specific
2 purpose; on that basis, they claim that even if Giuliani was an agent of the Trump Committee, he
3 was acting in a personal capacity, not as an agent, when he appeared in “Leadership.”¹⁶

4 Giuliani likewise maintains that he participated in the production of the advertisement
5 “solely in his personal capacity, as a volunteer, and without any actual or implied authority from
6 the Trump campaign.”¹⁷ He provides an engagement letter dated July 25, 2016, from GAP’s
7 counsel to Giuliani’s counsel, which provides that “at no time did [Giuliani] express, imply, or in
8 any way lead [GAP] to believe he had any authority — actual or implied — to act on behalf of or
9 as an agent of any campaign.”¹⁸ Giuliani also submits a sworn statement averring that he told his
10 counsel that he planned to participate in producing an ad for a Super PAC “as a private citizen”
11 and “not an agent or surrogate for the Trump campaign[.]”¹⁹ However, Giuliani acknowledges
12 that “subsequent to doing the ad, I became more involved in the Trump campaign . . . as a
13 surrogate for Mr. Trump[.]”²⁰

14 III. FACTUAL AND LEGAL ANALYSIS

15 Under the Federal Election Campaign Act of 1971, as amended (“Act”), a contribution
16 includes any gift, subscription, loan, advance, or deposit of money or anything of value made by
17 any person for the purpose of influencing any election for Federal office.²¹ “Anything of value”

¹⁶ *Id.* at 5–7.

¹⁷ Giuliani Resp. at 3.

¹⁸ *Id.* at Ex. 1.

¹⁹ *Id.* at Ex. 3 ¶ 4.

²⁰ *Id.* ¶ 10.

²¹ 52 U.S.C. § 30101(8)(A)(i).

1 includes all in-kind contributions.²² Independent-expenditure-only political committees are
2 permitted to solicit and raise unlimited contributions, and can receive contributions from
3 corporations and labor unions, *i.e.*, they may solicit and receive funds outside the Act's
4 limitations and source prohibitions.²³ As such, however, they may only make independent
5 expenditures, and are not permitted to make any contributions directly to candidates, including
6 in-kind contributions via coordinated communications, which would be excessive or prohibited
7 contributions under the Act.²⁴

8 A "coordinated" communication is one that "(1) Is paid for, in whole or in part, by a
9 person other than that candidate, authorized committee, or political party committee; (2) Satisfies
10 at least one of the content standards in paragraph (c) of this section; and (3) Satisfies at least one
11 of the conduct standards in paragraph (d) of this section."²⁵ The "content standard" is satisfied
12 if, among other things, a communication "expressly advocates . . . the election or defeat of a
13 clearly identified candidate for Federal office."²⁶ The "conduct standard" is satisfied; "whether
14 or not there is agreement or formal collaboration," if, among other things, "[a] candidate,
15 authorized committee, or political party committee [or an agent thereof] is materially involved in
16 decisions regarding: (i) The content of the communication[.]"²⁷

²² 11 C.F.R §§ 100.52(d)(1), 100.111(e)(1).

²³ See *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); Advisory Op. 2010-11 (Commonsense Ten); see also 52 U.S.C. §§ 30116(a)(1) and 30118(a).

²⁴ See 52 U.S.C. §§ 30116(a)(1), 30116(f), and 30118(a); AO 2010-11 at 2-3.

²⁵ 11 C.F.R. § 109.21(a).

²⁶ *Id.* at § 109.21(c)(3).

²⁷ *Id.* at § 109.21(d)(2); see *id.* § 109.20(a) ("For purposes of this subpart C, any reference to a candidate, or a candidate's authorized committee, or a political party committee includes an agent thereof."). The conduct prong would also be satisfied if "a candidate, authorized committee, or political party committee is materially involved in decisions regarding . . . (ii) The intended audience for the communication; (iii) The means or mode of the communication; (iv) The specific media outlet used for the communication; (v) The timing or frequency of the communication; or (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite." *Id.* at § 109.21(d)(2).

1 Commission regulations define an "agent" as "any person who has actual authority, either
2 express or implied" to engage in particular conduct, including the authority to "be materially
3 involved in decisions" regarding a communication, as outlined in the conduct prong of the
4 coordinated-communications test.²⁸ The Commission has concluded that "it is highly
5 implausible" that a *candidate* "would appear in a communication without being materially
6 involved" in its production,²⁹ and has reached the same conclusion when agents of a candidate
7 reviewed the proposed content of a communication before the candidate's appearance in that
8 communication.³⁰ However, the Commission has also determined that an agent of a federal
9 candidate can, in his or her personal capacity, engage in conduct that is prohibited for federal
10 candidates and agents acting on their behalf, such as, *e.g.*, soliciting and raising funds outside the
11 limits and prohibitions of the Act exclusively on behalf of a nonfederal political committee.³¹
12 Similarly, the Commission has found that informal ongoing personal relationships between
13 individuals associated with one organization and individuals associated with another
14 organization are insufficient to establish a particular relationship between the two
15 organizations.³²

16 Here, the available record does not support a reasonable inference that Giuliani was an
17 agent for Trump or the Trump Committee when he appeared in "Leadership." An "agent" is a
18 person that has actual authority to act on behalf of a candidate or committee, including the
19 authority to be materially involved in decisions relating to the content of communications made

²⁸ *Id.* at § 109.3; *see id.* at § 109.21(d)(2).

²⁹ Advisory Op. 2003-25 (Jonathan Weinzapfel) at 6.

³⁰ *See* Advisory Op. 2004-1 (Alice Forgy Kerr for Congress) at 3 ("[I]nvolvement by the President's agents, whenever it occurs, would constitute material involvement for purposes of the conduct standard.").

³¹ Advisory Op. 2007-05 (Erik Iverson) at 4; *see* Advisory Op. 2003-10 (Rory Reid).

³² *See* MUR 5338 (The Leadership Forum), First General Counsel's Rpt. at 18-19.

1 on behalf of the candidate or committee.³³ While actual authority can be express or implied, the
2 available evidence, viewed as a whole, does not support the conclusion that Giuliani had such
3 authority at the time that he participated in making "Leadership." For example, although
4 Giuliani advised Trump regarding his campaign as early as February 2016, he publicly
5 emphasized that he was only providing informal advice as a personal friend and not campaign
6 strategy as an officer or employee of the Trump Committee.³⁴

7 In April 2016, Giuliani appeared on CNN and offered his personal view that Trump is the
8 "best choice" for President, but "repeatedly stressed that he is not involved with the Trump
9 campaign."³⁵ He explained that he is "not part of the organization," and is "not a surrogate" for
10 the Trump Committee, stressing, "I'm not part of the campaign apparatus. I don't want people to
11 think I am."³⁶ Although Giuliani made numerous media appearances in which he emphatically
12 supported Trump prior to appearing in "Leadership," he specifically denied that he was an agent
13 of the Trump Committee at the time, and he maintains that assertion now in a sworn statement.

14 Certain facts in the record, viewed in isolation, might suggest that Giuliani had implied
15 actual authority to act as an agent for the Trump Committee. Giuliani was a frequent, vocal
16 advocate for Trump's candidacy, and an equally vehement critic of Trump's presumptive
17 opponent, Hillary Clinton, in the weeks before and shortly after the release of "Leadership."³⁷

³³ While the Commission's has opined that a *candidate* appearing in a communication is "materially involved," it has not reached the issue of whether that same reasoning applies to the appearance of a person alleged to have been a candidate's agent — a point that the Trump Committee raised in its Response. *See* Trump Resp. at 7.

³⁴ *See* Costa, *supra*, n. 8 ("Giuliani . . . has counseled [Trump] 'as a close personal friend' about campaign issues. . . [saying] 'It's nothing formal. It's kind of a running conversation.'").

³⁵ Christopher Donato and Veronica Stracqualursi, "Former New York City Mayor Rudy Giuliani Endorses Donald Trump," ABC NEWS (Apr. 19, 2016), <http://abcnews.go.com/Politics/york-city-mayor-rudy-giuliani-endorses-donald-trump/story?id=38506385>.

³⁶ *Id.*

³⁷ *See, e.g.*, Nolan D. McCaskill, "Trump: I'm Considering Giuliani to Head Commission on Immigration," POLITICO (May 11, 2016), <http://www.politico.com/story/2016/05/trump-rudy-giuliani-immigration223050>; Maggie

1 Giuliani admits that he also frequently counseled Trump on a variety of issues related to the
2 campaign and Trump acknowledged that "Giuliani has become part of his inner circle."³⁸ In his
3 sworn statement, Giuliani also acknowledges that he later became more involved in the Trump
4 campaign, and as a "surrogate" for Mr. Trump, often travelled with him.³⁹ Giuliani maintains,
5 however, that this happened "subsequent to doing the ad."⁴⁰ Although Giuliani's response did
6 not specify a date on which his role in the Trump campaign increased to the point where he
7 considered himself a "surrogate" for the candidate, we note that he took a leave of absence from
8 his law firm to advocate for Trump's election two months after appearing in "Leadership."⁴¹

9 While these facts may be individually suggestive, the available record, viewed as a
10 whole, does not support the conclusion that Giuliani satisfied the specific definition of "agent"
11 set forth in the Commission's regulations when he appeared in "Leadership." Although Giuliani
12 was an advisor to Trump, he does not appear to have had actual authority, express or implied, to
13 be materially involved in decisions regarding communications on behalf of Trump or the Trump
14 Committee.⁴² To the contrary, GAP and Giuliani clarified their understanding that Giuliani did
15 not have such authority in a contemporaneous engagement letter, which stipulated that Giuliani
16 would appear in "Leadership" only in a voluntary, personal capacity.⁴³

Haberman, "Pro-Donald Trump 'Super PAC' to Run Ads in Battleground States," N.Y. TIMES (July 28, 2016), <https://www.nytimes.com/2016/07/29/us/politics/pro-donald-trump-super-pac-to-run-ads-in-battleground-states.html> ("The group, the Great America PAC, said it now had ads starring Rudolph W. Giuliani, who has *emerged as Mr. Trump's main defender.*") (emphasis added); Ryan Struyk, "Rudy Giuliani Defends Donald Trump's Second Amendment Comments on 'GMA'," ABC NEWS (Aug. 10, 2016), <http://abcnews.go.com/Politics/rudy-giuliani-defends-donald-trumps-amendment-comments-gma/story?id=4126339>.

³⁸ Costa, *supra*, n. 8.

³⁹ Giuliani Resp. at Ex. 3 ¶ 10.

⁴⁰ *Id.*

⁴¹ Kurson, *supra*, n.8.

⁴² See 11 C.F.R. § 109.3.

⁴³ Giuliani Resp. at Ex. 1.

1 Because the available information does not support the conclusion that Giuliani was an
2 agent for Trump or the Trump Committee when he appeared in "Leadership," Giuliani's actions
3 do not satisfy the conduct prong of the coordinated-communications test.⁴⁴ We therefore
4 recommend that the Commission find no reason to believe that GAP made, and Trump and the
5 Trump Committee knowingly accepted, a prohibited or excessive in-kind contribution, and find
6 no reason to believe that Giuliani violated the Act or Commission regulations in connection with
7 the allegations raised in this matter.

8 **IV. RECOMMENDATIONS**

- 9 1. Find no reason to believe that Great America PAC and Dan Backer in his official
10 capacity as treasurer violated 52 U.S.C. §§ 30116(a)(1) and 30118(a);
11 2. Find no reason to believe that Donald J. Trump, Donald J. Trump for President, Inc.
12 and Bradley T. Crate in his official capacity as treasurer violated 52 U.S.C.
13 § 30116(f);
14 3. Find no reason to believe that Rudolph W. Giuliani violated the Act or the
15 Commission's regulations in connection with the allegations raised in the Complaint;
16 4. Approve the attached Factual and Legal Analysis;
17 5. Approve the appropriate letters; and
18 6. Close the file.

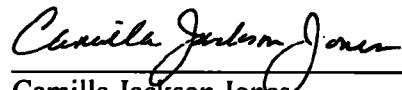
19 Lisa J. Stevenson
20 Acting General Counsel

21 Date: 6/1/2017

Kathleen Guith
Kathleen M. Guith
Associate General Counsel for Enforcement

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

⁴⁴ See 11 C.F.R. §§ 109.3, 109.21(d).


Camilla Jackson Jones
Attorney

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Great America PAC and Dan Backer in his official capacity as treasurer MUR 7151
Rudolph W. Giuliani
Donald J. Trump
Donald J. Trump for President, Inc.
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I. INTRODUCTION

The Complaint in this matter alleges that Great America PAC and Dan Backer in his official capacity as treasurer ("GAP"), an independent-expenditure-only political committee, coordinated communications with Donald J. Trump's 2016 authorized presidential campaign committee, Donald J. Trump for President, Inc. and Bradley T. Crate in his official capacity as treasurer (the "Trump Committee"),² resulting in prohibited in-kind contributions. Specifically, the Complaint alleges that in July 2016, GAP produced an advertisement that featured former New York City Mayor Rudolph "Rudy" Giuliani expressly advocating for the election of Trump in the 2016 presidential election. The Complaint alleges that the advertisement satisfied the "conduct prong" of the Commission's test for coordinated communications because Giuliani was an agent of the Trump Committee. Respondents deny the allegation that Giuliani was an agent of Trump or the Trump Committee at the time, and argue that he appeared in the advertisement solely in his personal capacity.

¹ Bradley T. Crate became treasurer for Donald J. Trump for President, Inc. on January 20, 2017. Timothy Jost was the treasurer at the time the Committee was notified of the allegations raised in the Complaint.

² See Amended Trump Cmte. Statement of Org. at 1 (Jan. 20, 2017). The Trump Committee's previous treasurer was Timothy Jost. See Trump Cmte. Statement of Org. at 1 (June 26, 2015).

1 The available record does not support the conclusion that Giuliani was an agent of Trump
2 or the Trump Committee when he appeared in the GAP advertisement in July 2016, or otherwise
3 establish that the advertisement was a coordinated communication. Therefore, the Commission
4 finds no reason to believe that Respondents made or accepted prohibited in-kind contributions in
5 connection with the advertisement.

6 **II. FACTUAL BACKGROUND**

7 On February 8, 2016, GAP registered with the Commission as an independent-
8 expenditure-only political committee and named Dan Backer as its treasurer.³ During the 2016
9 election cycle, GAP reported making independent expenditures of approximately \$23,583,643 to
10 support Donald Trump or oppose Hillary Clinton in the 2016 presidential election.⁴ GAP made
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13 The Complaint alleges that on July 26, 2016, GAP released an advertisement entitled
14 “Leadership” in which Giuliani appears on screen discussing the need to combat “Islamic
15 extremist terrorism,” criticizing President Obama and Hillary Clinton’s leadership, and stating
16 that “America’s leadership can and must be better, and with Donald Trump as President, it will

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⁵ GAP Amended August 2016 Monthly Report at 4 (Jan. 31, 2017).

1 be.”⁶ The Complaint alleges that because GAP paid for “Leadership” and the advertisement
2 expressly advocates for the election of Trump as President, it meets the “paid for” and “content”
3 prongs, respectively, of the Commission’s three-prong coordinated-communications test.⁷ The
4 Complaint notes that Giuliani served as an advisor to Trump, and in October 2016 took a leave
5 of absence from his law firm to continue advocating for Trump’s election as President.⁸

6 The Complaint infers that Giuliani therefore served as an “agent” for the Trump
7 Committee, and, by appearing in “Leadership,” was “materially involved” in its creation, thereby
8 meeting the “conduct” prong of the coordinated-communications test.⁹ The Complaint claims
9 that because “Leadership” satisfies all three prongs of the Commission’s coordination test, it
10 constitutes a coordinated communication, resulting in GAP making, and the Trump Committee
11 knowingly accepting, a prohibited in-kind contribution.¹⁰

12 GAP, Trump and the Trump Committee, and Giuliani each deny that “Leadership”
13 satisfied the Commission’s coordinated-communications test, and claim that “Giuliani was not
14 an agent of the Trump campaign.”¹¹ Specifically, GAP claims that Giuliani did not possess

⁶ Compl. at 3 (Oct. 14, 2016) (citing Great America PAC, “Leadership” (July 26, 2016), <https://www.youtube.com/watch?v=K9B711McRo>). The Complaint also claims that GAP produced a solicitation email under Giuliani’s name, which Giuliani reviewed and signed, to raise funds for GAP’s activities in support of Trump’s candidacy. *Id.*

⁷ Compl. at 4; *see* 11 C.F.R. § 109.21.

⁸ Compl. at 2 (citing Robert Costa, “Donald Trump Consults with Rudy Giuliani as He Builds Political Kitchen Cabinet,” WASH. POST (Feb. 21, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/21/donald-trump-consults-with-rudy-giuliani-as-he-builds-political-kitchen-cabinet/?utm_term=.9deccc26f2b2; Ken Kurson, “Rudy Giuliani Takes Break from Law Firm to Support Donald Trump,” OBSERVER (Oct. 5, 2016), <http://observer.com/2016/10/exclusive-rudy-giuliani-sidelined-by-law-firm-for-supporting-donald-trump>).

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3 Committee for some purposes, he did not have the authority to act on its behalf regarding
4 communications by third parties such as GAP. Respondents also maintain that, in any event,
5 Giuliani participated in the production of “Leadership” only in his personal capacity as a
6 volunteer, not as a surrogate for the Trump Committee.¹³

7 Trump and the Trump Committee maintain that Giuliani was a “friend of the candidate”
8 who offered “informal advice and counsel . . . on an ad hoc, volunteer basis[.]”¹⁴ They contend
9 that the Complaint provides no evidence that Giuliani was authorized to act as an agent of Trump
10 or the Trump Committee at the time the ad was produced, and note that “Leadership” identifies
11 Giuliani as the former mayor of New York, not a surrogate for the Trump Committee.¹⁵ They
12 also note that Commission precedent permits agents to “wear multiple hats” and act in a personal
13 capacity for a specific purpose; on that basis, they claim that even if Giuliani was an agent of the
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15 “Leadership.”¹⁶

16 Giuliani likewise maintains that he participated in the production of the advertisement
17 “solely in his personal capacity, as a volunteer, and without any actual or implied authority from

official capacity as treasurer, at 1–2 (Dec. 13, 2016) (“Trump Resp.”); Resp. of Rudolph W. Giuliani at 1 (Dec. 22, 2016) (“Giuliani Resp.”).

¹² GAP Resp. at 4.

¹³ *Id.* at 6–7.

¹⁴ Trump Resp. at 2.

¹⁵ *Id.* at 3–5.

¹⁶ *Id.* at 5–7.

1 the Trump campaign.”¹⁷ He provides an engagement letter dated July 25, 2016, from GAP’s
2 counsel to Giuliani’s counsel, which provides that “at no time did [Giuliani] express, imply, or in
3 any way lead [GAP] to believe he had any authority — actual or implied — to act on behalf of or
4 as an agent of any campaign.”¹⁸ Giuliani also submits a sworn statement averring that he told his
5 counsel that he planned to participate in producing an ad for a Super PAC “as a private citizen”
6 and “not an agent or surrogate for the Trump campaign[.]”¹⁹ However, Giuliani acknowledges
7 that “subsequent to doing the ad, I became more involved in the Trump campaign . . . as a
8 surrogate for Mr. Trump[.]”²⁰

9 III. FACTUAL AND LEGAL ANALYSIS

10 Under the Federal Election Campaign Act of 1971, as amended (“Act”), a contribution
11 includes any gift, subscription, loan, advance, or deposit of money or anything of value made by
12 any person for the purpose of influencing any election for Federal office.²¹ “Anything of value”
13 includes all in-kind contributions.²² Independent-expenditure-only political committees are
14 permitted to solicit and raise unlimited contributions, and can receive contributions from
15 corporations and labor unions, *i.e.*, they may solicit and receive funds outside the Act’s
16 limitations and source prohibitions.²³ As such, however, they may only make independent

¹⁷ Giuliani Resp. at 3.

¹⁸ *Id.* at Ex. 1.

¹⁹ *Id.* at Ex. 3 ¶ 4.

²¹ 52 U.S.C. § 30101(8)(A)(i).

²¹ 52 U.S.C. § 30101(8)(A)(i).

²² 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

²³ See *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); Advisory Op. 2010-11 (Commonsense Ten); see also 52 U.S.C. §§ 30116(a)(1) and 30118(a).

1 expenditures, and are not permitted to make any contributions directly to candidates, including
2 in-kind contributions via coordinated communications, which would be excessive or prohibited
3 contributions under the Act.²⁴

4 A “coordinated” communication is one that “(1) Is paid for, in whole or in part, by a
5 person other than that candidate, authorized committee, or political party committee; (2) Satisfies
6 at least one of the content standards in paragraph (c) of this section; and (3) Satisfies at least one
7 of the conduct standards in paragraph (d) of this section.”²⁵ The “content standard” is satisfied
8 if, among other things, a communication “expressly advocates . . . the election or defeat of a
9 clearly identified candidate for Federal office.”²⁶ The “conduct standard” is satisfied, “whether
10 or not there is agreement or formal collaboration,” if, among other things, “[a] candidate,
11 authorized committee, or political party committee [or an agent thereof] is materially involved in
12 decisions regarding: (i) The content of the communication[.]”²⁷

13 Commission regulations define an “agent” to include “any person who has actual
14 authority, either express or implied” to engage in particular conduct on behalf of a federal
15 candidate, including the authority to “be materially involved in decisions” regarding a
16 communication, as outlined in the conduct prong of the coordinated-communications test.²⁸

²⁴ See 52 U.S.C. §§ 30116(a)(1), 30116(f), and 30118(a); AO 2010-11 at 2-3.

²⁵ 11 C.F.R. § 109.21(a).

²⁶ *Id.* at § 109.21(c)(3).

²⁷ *Id.* at § 109.21(d)(2); *see id.* § 109.20(a) (“For purposes of this subpart C, any reference to a candidate, or a candidate’s authorized committee, or a political party committee includes an agent thereof.”). The conduct prong would also be satisfied if “a candidate, authorized committee, or political party committee is materially involved in decisions regarding . . . (ii) The intended audience for the communication; (iii) The means or mode of the communication; (iv) The specific media outlet used for the communication; (v) The timing or frequency of the communication; or (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.” *Id.* at § 109.21(d)(2).

²⁸ *Id.* at § 109.3(b)(4); *see id.* at § 109.21(d)(2).

1 Here, the available record does not support a reason to believe that Giuliani was an agent
2 for Trump or the Trump Committee when he appeared in “Leadership.” Although Giuliani was
3 an advisor to Trump, he does not appear to have had actual authority, express or implied, to be
4 materially involved in decisions regarding communications on behalf of Trump or the Trump
5 Committee.²⁹ To the contrary, GAP and Giuliani clarified their understanding that Giuliani did
6 not have such authority in a contemporaneous engagement letter, which stipulated that Giuliani
7 would appear in “Leadership” only in a voluntary, personal capacity.³⁰ Moreover, in a sworn
8 statement, Giuliani maintains that he was not an agent of the Trump Committee at the time of the
9 ad.³¹

10 Because the available information does not support the conclusion that Giuliani was an
11 agent for Trump or the Trump Committee when he appeared in “Leadership,” Giuliani’s actions
12 do not satisfy the conduct prong of the coordinated-communications test.³² Therefore, the
13 Commission finds no reason to believe that GAP made, and Trump and the Trump Committee
14 knowingly accepted, a prohibited or excessive in-kind contribution, and finds no reason to
15 believe that Giuliani violated the Act or Commission regulations in connection with the
16 allegations raised in this matter.

³¹ Giuliani Resp. at Ex. 3.

³¹ Giuliani Resp. at Ex. 3.

³¹ Giuliani Resp. at Ex. 3.

³² See 11 C.F.R §§ 109.3, 109.21(d).